

EXHIBIT BB
BERGER DEPO EXCERPTS

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4
5 THE BLACK & DECKER CORPORATION,)
6 BLACK & DECKER, INC. and)
7 BLACK & DECKER (U.S.), INC.,)
8)
9 Plaintiffs,) No. 1:11-cv-05426
10)
11)
12 vs.)
13)
14 POSITEC USA, INC., and)
15 RW DIRECT, INC.,)
16)
17 Defendants.)

18
19 Videotaped deposition of JAMES T. BERGER,
20 taken before JUNE M. FUNKHOUSER, CSR, RMR, and
21 Notary Public, pursuant to the Federal Rules of
22 Civil Procedure for the United States District
23 Courts pertaining to the taking of depositions, at
24 555 Skokie Boulevard, Suite 500, Northbrook,
25 Illinois, commencing at 9:30 a.m. on
 February 14, 2014.

10:14:31 1 other types of surveys, for example, secondary
10:14:34 2 meaning, if we're just talking about likelihood of
10:14:38 3 confusion, isn't it typically the goal to try to
10:14:42 4 recreate what the respondent would actually see in
10:14:44 5 the market?

10:14:44 6 MR. CULIG: Objection; asked and
10:14:46 7 answered.

10:14:46 8 A The market meaning where the products are
10:14:49 9 sold? Is that what you mean?

10:14:53 10 BY MR. THEUERKAUF:

10:14:53 11 Q Correct.

10:14:54 12 A Not necessarily, as I answered before.

10:14:56 13 Q Okay.

10:14:56 14 A It depends.

10:14:57 15 Q Okay. And I just want to be sure I'm
10:15:00 16 clear and that I understand. So it depends -- you
10:15:04 17 might not try to recreate the market conditions
10:15:08 18 if -- can you give me an example?

10:15:14 19 A Sure. The secondary meaning survey that
10:15:16 20 we did in this case. We didn't show market
10:15:19 21 conditions.

10:15:20 22 Q And I guess that's -- and I apologize.
10:15:22 23 Maybe I wasn't clear earlier. I was trying to
10:15:24 24 limit the question to likelihood of confusion
10:15:27 25 surveys.

10:16:37 1 condition?

10:16:37 2 A Well, again, we're on the same -- if you
10:16:42 3 have a consumer packaged good product, which is a
10:16:48 4 category of products, you might, might be -- it
10:16:53 5 might be appropriate to create the market but,
10:16:57 6 again, it might not be appropriate. It might be
10:17:00 7 just the name.

10:17:03 8 I'm working on a case now where the
10:17:09 9 likelihood of confusion -- it's a -- working for
10:17:14 10 the defendant, and the likelihood of confusion is
10:17:17 11 the word Bella, B-e-l-l-a, and their products are
10:17:25 12 sold in Nordstrom and other places and the -- the
10:17:29 13 survey centers around simply the logo of -- the
10:17:35 14 logo Bella and it confuses with the other logo. We
10:17:39 15 didn't show a market. We just simply showed the
10:17:42 16 names.

10:17:42 17 When you're dealing with more
10:17:44 18 sophisticated business-to-business products, I
10:17:49 19 mean, services, how do you possibly show the
10:17:53 20 market? You can't. So, I mean, it all depends on
10:17:58 21 what you're trying to do and there are no general
10:18:04 22 rules.

10:18:05 23 Q Okay. All right. If we could go back to
10:18:46 24 what is Exhibit 3, which is your likelihood of
10:18:49 25 confusion report in this case.

10:18:51 1 A Yes, sir.

10:18:54 2 Q Can you explain to me what you were --

10:18:58 3 exactly what you were asked to do with respect to

10:19:01 4 this survey?

10:19:02 5 A Yes, I can do that.

10:19:04 6 Q Thank you.

10:19:05 7 A I was given a photograph, and I was

10:19:09 8 instructed to conduct the survey based on that

10:19:15 9 photograph whether somebody -- an appropriate

10:19:20 10 member of the target market were to observe that

10:19:23 11 photograph they were asked to question -- let's see

10:19:30 12 the exact question they were asked.

10:19:35 13 One question in the survey. "Today we

10:19:45 14 are conducting a survey focusing on power tools.

10:19:47 15 Here is a display of packaged products as you might

10:19:50 16 see them at a Home Depot or Lowe's store. Do you

10:19:55 17 believe the products are put out by the same

10:19:58 18 company?" That was the survey.

10:20:00 19 Q Okay. Other than the photograph that you

10:20:07 20 were giving -- given, were there any other

10:20:10 21 assumptions that you were asked to make in

10:20:13 22 conducting the survey?

10:20:14 23 A No.

10:20:15 24 Q Okay. And if you'll turn to I think it

10:20:19 25 was maybe just the page -- no, I'm sorry. If

10:20:23 1 you'll go to Exhibit B of your report, and if
10:20:32 2 you'll turn to the page that has a photograph on
10:20:34 3 it.

10:20:34 4 A Yes.

10:20:35 5 Q Was that the photograph that you were
10:20:36 6 given?

10:20:37 7 A Yes.

10:20:38 8 Q Okay. Was the photograph -- did you do
10:20:44 9 anything to the photograph before you --

10:20:47 10 A I cropped the photograph.

10:20:48 11 Q You cropped it?

10:20:48 12 A Because I wanted to focus on the -- the
10:20:52 13 two rows of products, packaged products.

10:20:55 14 Q And you were asked to crop the photograph
10:20:57 15 or did you crop it?

10:20:58 16 A I did. I cropped it.

10:20:59 17 Q Okay. Counsel didn't ask you to crop it?

10:21:01 18 A No.

10:21:02 19 Q Okay. Did you do anything else to the
10:21:17 20 photograph other than crop it?

10:21:20 21 A I don't believe so.

10:21:22 22 Q Okay. And do you know where that
10:21:25 23 photograph came from?

10:21:26 24 A I don't. It was just given to me.

10:21:28 25 Q Okay. And is that photograph there on

10:22:35 1 A They saw something that looked like this
10:22:38 2 but I believe of better quality.

10:22:40 3 Q Okay. Do you know whether it was of a
10:22:42 4 better quality than this?

10:22:43 5 A I really don't.

10:22:44 6 Q Okay.

10:22:44 7 A Well, wait a minute. Wait a minute.

10:22:46 8 Yes, I do, because I was able to see the
10:22:50 9 protocol -- I was able to see the survey before it
10:22:55 10 was -- it was out, and it was a higher quality than
10:22:59 11 this.

10:22:59 12 Q Do you have the actual survey still that
10:23:02 13 we can see to see the actual photograph that was
10:23:04 14 used?

10:23:05 15 A No, I don't. That -- you might be able
10:23:14 16 to get that, I don't know, from the research
10:23:21 17 company that did it.

10:23:22 18 Q Okay. So as we sit here right now
10:23:24 19 there's no actual way to know or see what the
10:23:27 20 survey respondents actually looked at?

10:23:29 21 A As we sit here today, no.

10:23:39 22 Q Okay. So I just want to back up to what
10:23:47 23 you were -- what you were specifically asked to do.
10:23:54 24 And I don't -- I don't want to misstate your
10:23:57 25 testimony --

10:23:57 1 A Of course.

10:23:58 2 Q -- so if you could -- and I hate to be

10:24:00 3 redundant, but if you could repeat it for me again

10:24:03 4 what it was that you were asked to do with this

10:24:05 5 photograph.

10:24:06 6 A I was instructed by my client to do a

10:24:10 7 survey based on this photograph.

10:24:13 8 Q Okay.

10:24:14 9 A And the survey I developed was what I was

10:24:18 10 instructed to do.

10:24:19 11 Q Okay. Were you instructed to ask that

10:24:23 12 question?

10:24:24 13 A That was the question that I devised

10:24:26 14 myself.

10:24:27 15 Q Okay. Were you told what the goal of the

10:24:30 16 survey was?

10:24:34 17 A The goal of the survey was to test

10:24:37 18 likelihood of confusion.

10:24:38 19 Q Okay. And the likelihood of confusion

10:24:42 20 between what?

10:24:45 21 A The idea that if people saw an array of

10:24:49 22 products like so of all the same colors would they

10:24:53 23 be -- would they think that they were all coming

10:24:57 24 from the same source, and that's what was tested.

10:25:04 25 Clearly there was a Rockwell product within all the

10:25:09 1 DeWalt products and was there possible confusion or
10:25:15 2 a likelihood of confusion when they saw products of
10:25:20 3 the same color, and the colors are -- are clearly
10:25:26 4 identical. So that was what was being tested.

10:25:32 5 Q And you --

10:25:33 6 A The yellow and black.

10:25:34 7 Q Okay. And you base your testimony that
10:25:40 8 the colors were clearly identical on the
10:25:45 9 photograph?

10:25:45 10 A Yes.

10:25:46 11 Q Okay. Have you actually ever seen the
10:25:48 12 Rockwell packaging in person?

10:25:51 13 A I don't believe so.

10:25:57 14 Q Okay. On page 2 of your report --
10:26:13 15 actually before I go there, how did -- how did
10:26:19 16 you -- so let me back up.

10:26:22 17 The task was given to you to conduct
10:26:24 18 this survey. How did you actually go about
10:26:26 19 logistically conducting this survey?

10:26:29 20 A Okay. When I am given a survey I
10:26:33 21 generally deal with a subcontractor. The one
10:26:39 22 that -- the one of choice I've been dealing -- I've
10:26:42 23 been working with this outfit for quite a long
10:26:45 24 time. It's called Precision Research. They're out
10:26:49 25 of Des Plaines, Illinois. The project manager that

10:42:20 1 A I don't know how they got that that way,
10:42:24 2 but okay.

10:42:27 3 Q Can you tell me what that was intended to
10:42:29 4 say?

10:42:30 5 A Determine if a likelihood of confusion
10:42:32 6 exists between Black & Decker Corporation's DeWalt
10:42:39 7 trade dress and Positec USA's Rockwell trade dress.

10:42:43 8 Q Okay. What is your understanding of
10:42:48 9 the -- of what the Black & Decker Corporation's
10:42:54 10 DeWalt trade dress is?

10:42:55 11 A Yellow and black.

10:42:59 12 Q And as it -- as it applies to tools?

10:43:06 13 A Tools, packaging, and anything else
10:43:11 14 associated with DeWalt.

10:43:15 15 I'm a -- I teach marketing, you know,
10:43:20 16 at the college level, and the DeWalt story is one
10:43:25 17 of the stories that we use in the classroom. They
10:43:28 18 took this brand and they created a line of
10:43:31 19 professional power tools, and they did it in such a
10:43:34 20 way that everything that they've done is based on
10:43:39 21 color. They sent people out to work sites in
10:43:44 22 yellow and black automobiles and trucks and their
10:43:50 23 advertising, everything that DeWalt does is based
10:43:55 24 on that yellow and black.

10:43:57 25 Q Okay. And is it your understanding that

10:43:59 1 the yellow is a certain shade of yellow?

10:44:04 2 A Yes. There's a certain type of shade of
10:44:07 3 yellow. I mean, colors can range from pale to
10:44:14 4 bright, but it's a certain it's called a PMS code,
10:44:18 5 I don't know what it is, of yellow.

10:44:20 6 Q But there's a certain DeWalt yellow?

10:44:22 7 A Yes.

10:44:22 8 Q Not just any yellow?

10:44:25 9 A That is correct.

10:44:25 10 Q Okay. So in your mind does it matter,
10:44:34 11 for example, on, let's say, a power tool itself how
10:44:39 12 much of the tool is yellow and how much of it is
10:44:42 13 black or vice versa?

10:44:47 14 A The tool itself? Only to the extent that
10:44:52 15 it's identifiable.

10:44:54 16 Q Okay. But -- but it would have to have
10:45:01 17 both colors, right, the DeWalt yellow and the
10:45:05 18 black?

10:45:05 19 MR. CULIG: Object to form.

10:45:08 20 A I really don't know. I mean, I'm not --
10:45:13 21 I don't know the entire line of the DeWalt power
10:45:18 22 tools. I've seen a -- I've seen many of them when
10:45:23 23 I -- when I go to the -- the store, when I go to
10:45:27 24 The Home Depot I see some of them, but I don't -- I
10:45:30 25 can't give you an answer for all of them.

10:45:31 1 BY MR. THEUERKAUF:

10:45:31 2 Q Okay. But your understanding at least at
10:45:34 3 the time of this report is that the trade dress was
10:45:36 4 yellow and black, not just yellow; is that correct?

10:45:42 5 A Yellow is the most identifiable color of
10:45:45 6 the two, but, yes, the -- the trade dress is yellow
10:45:49 7 and black.

10:45:50 8 Q Okay. What's your understanding of what
10:45:56 9 the -- in that first sentence again you identify
10:45:59 10 the Rockwell trade dress. What's your
10:46:01 11 understanding of what that trade dress is?

10:46:04 12 A I have seen some photos, they were in my
10:46:10 13 file, of the Rockwell -- of some of the Rockwell
10:46:16 14 products and they were -- they were colored very
10:46:22 15 similar to the DeWalt products. They had a yellow
10:46:25 16 and black look to them.

10:46:29 17 Q What products were those?

10:46:31 18 A I don't exactly recall. They were in my
10:46:34 19 file. There were -- there were four or six of
10:46:41 20 them, I think.

10:46:42 21 Q Were they the actual tools themselves?

10:46:45 22 A Yes, they were.

10:46:46 23 Q Okay. Did you produce those photos in
10:46:51 24 the document production?

10:46:54 25 A They were -- yes, they were in my file.

10:48:48 1 A Yes.

10:48:50 2 Q Okay. Did you -- have you tested --

10:48:59 3 other than the one Rockwell package that's shown in

10:49:05 4 the -- the likelihood of confusion survey from your

10:49:09 5 report, have you tested any other Rockwell products

10:49:13 6 or packaging?

10:49:17 7 A I don't -- I don't believe so. I think

10:49:21 8 there was another likelihood of confusion study

10:49:26 9 that we did that we did not submit, and I don't

10:49:32 10 recall what we tested in that.

10:49:34 11 Q Okay. Do you recall why you didn't

10:49:38 12 submit that one?

10:49:39 13 A No, I don't.

10:49:42 14 Q In a likelihood of confusion survey for

10:50:04 15 color trade dress, wouldn't you agree that it --

10:50:10 16 that it's important that the survey participants

10:50:14 17 see the accurate colors of the products being

10:50:21 18 shown?

10:50:24 19 A I would agree that accuracy is important,

10:50:27 20 yes.

10:50:29 21 Q Okay. Because if they're not seeing the

10:50:36 22 colors of the actual -- or the actual colors of the

10:50:41 23 products or packaging, it may skew the -- skew the

10:50:45 24 survey; would you agree?

10:50:48 25 A It's possible, yes.

10:51:04 1 Q Do you know when the -- the products --
10:51:17 2 the Defendants' products that are being accused of
10:51:21 3 infringement, do you know when they entered the
10:51:24 4 market, what year?

10:51:25 5 A No, I don't.

10:51:26 6 Q Okay. You have mentioned professional
10:51:43 7 tradesmen and the serious do-it-yourselfer as
10:51:47 8 the -- I guess the target?

10:51:49 9 A Relevant target market.

10:51:50 10 Q Okay. And was that the relevant target
10:51:53 11 market for both your likelihood of confusion and
10:51:56 12 secondary meaning survey?

10:51:57 13 A Yes.

10:51:58 14 Q Okay. And how did you -- let me ask you,
10:52:01 15 did you -- did you determine who the relevant
10:52:03 16 market should be?

10:52:07 17 A In conference with my client we came to
10:52:12 18 that agreement.

10:52:13 19 Q Okay. And was that a conference with --
10:52:17 20 with the Niro lawyers or was it with Black &
10:52:20 21 Decker?

10:52:20 22 A With the Niro lawyers.

10:52:22 23 Q Okay. And what was -- how did you
10:52:28 24 determine that that was the target market?

10:52:33 25 MR. CULIG: And I'm going to caution you

10:54:25 1 target market?

10:54:28 2 MR. CULIG: Objection to form.

10:54:30 3 A Yes.

10:54:32 4 BY MR. THEUERKAUF:

10:54:32 5 Q Okay. And do you know how -- how it was
10:54:41 6 determined that to be a serious do-it-yourselfer
10:54:45 7 you had to own \$1,000 or more of tools?

10:54:49 8 MR. CULIG: And I'll give you the same
10:54:50 9 caution as to specific attorney work -- expert work
10:54:55 10 product.

10:54:55 11 A Yeah, I -- I was -- that was conveyed to
10:54:58 12 me.

10:54:58 13 BY MR. THEUERKAUF:

10:54:58 14 Q Okay. So you don't know how \$1,000 --
10:55:01 15 how it came up to be \$1,000 or why it couldn't be
10:55:05 16 2,000?

10:55:06 17 A No, I don't.

10:55:08 18 Q Okay. Did you consider any other target
10:55:16 19 markets in doing your studies for this case?

10:55:21 20 A No.

10:55:23 21 Q Okay. What's -- what's the importance of
10:55:58 22 defining -- in your mind defining the target population?

10:56:05 23 A That's the essential aspect of a judgment
10:56:08 24 survey, which we did. When you're doing a judgment
10:56:11 25 survey, you define a relevant target market and you

11:01:18 1 and he uses power tools; doesn't necessarily
11:01:21 2 purchase them. The serious do-it-yourselfer uses
11:01:27 3 the power tools and is likely to purchase more
11:01:30 4 power tools.

11:01:31 5 Q Did -- did you do anything in this survey
11:01:34 6 to determine whether the do-it-yourselfers were
11:01:38 7 potential customers of the products being asked
11:01:42 8 about?

11:01:42 9 A We did not ask the question do you intend
11:01:45 10 to purchase.

11:01:47 11 Q Did you ask the question whether they
11:01:49 12 had -- if they had recently purchased power tools?

11:01:52 13 A No, we did not.

11:01:55 14 Q Is it accurate that if the -- if a
11:02:27 15 likelihood of confusion survey were to question
11:02:29 16 survey participants that would not be in the market
11:02:33 17 for the product that it could erroneously skew the
11:02:39 18 survey results?

11:02:45 19 A In this case, no, it would not.

11:02:48 20 Q Why is that in this case?

11:02:50 21 A Because we are just -- we were just
11:02:53 22 interested in people who had a -- in their
11:02:58 23 possession power tools worth \$1,000 which indicates
11:03:02 24 they are a serious do-it-yourselfer, and -- and
11:03:08 25 because of that the assumption is that they have

11:03:17 1 purchased and will probably purchase again.

11:03:21 2 Q But you didn't ask that question, though,
11:03:28 3 correct?

11:03:28 4 A We did not ask the question, but we went
11:03:30 5 on that assumption.

11:03:33 6 Q Did you also assume that all professional
11:03:47 7 tradesmen purchase their own tools?

11:03:50 8 A No, I didn't make that assumption at all.

11:03:53 9 Q Okay.

11:03:53 10 A Professional tradesmen use those tools.

11:03:57 11 Q So they may not be purchasers at all?

11:04:00 12 A Probably are not purchasers.

11:04:02 13 Q Okay. And so that the professional
11:04:47 14 tradesmen that aren't likely to buy their own or to
11:04:51 15 buy the tools to make the purchasing decision, why
11:04:54 16 were they important in your survey?

11:04:57 17 A Because they use the tools and they are
11:05:00 18 able to recognize the maker of the tools.

11:05:03 19 Q Okay. But those in -- so those
11:05:08 20 professional tradesmen in your survey that
11:05:11 21 responded to your survey aren't the ones likely to
11:05:14 22 make the purchasing decision; is that what you're
11:05:18 23 saying?

11:05:18 24 A I'm saying probably not.

11:05:20 25 Q Yeah. Okay.

11:08:45 1 On the other hand, somebody who works
11:08:47 2 for a construction company, who is on a work site,
11:08:52 3 the power tools are provided by the company, so
11:08:55 4 that professional workman would not be a purchaser.
11:08:59 5 Okay?

11:09:00 6 So that essentially would be two
11:09:07 7 aspects of the target market of -- of -- of
11:09:13 8 workmen, professional workmen.

11:09:17 9 BY MR. THEUERKAUF:

11:09:17 10 Q Are --

11:09:17 11 A So they very well -- you see very well
11:09:21 12 they might end up at a Home Depot or a Lowe's to
11:09:25 13 purchase something.

11:09:28 14 Q Are online customers, and by that I mean
11:09:38 15 people that purchase over the Internet, are they
11:09:41 16 part of the target population in this survey?

11:09:46 17 A Target population are professional
11:09:51 18 workmen and serious do-it-yourselfers. Now the
11:09:55 19 serious do-it-yourselfer might very well purchase
11:09:57 20 over the Internet. I don't know. Depends on -- on
11:10:00 21 what he needs.

11:10:03 22 Q Okay. Is it important to determine
11:10:08 23 whether the target population is purchasing through
11:10:11 24 stores or over the Internet?

11:10:19 25 A In this case it's not important. This

11:10:22 1 case we're simply testing whether the trade dress
11:10:27 2 in a photograph -- the essential question was, "Do
11:10:40 3 you believe that the products pictured are put out
11:10:42 4 by the same company?" That's all we were trying to
11:10:45 5 test in this survey.

11:10:46 6 Q But the -- for example, the people that
11:10:49 7 were, you know, the target population, for example,
11:10:51 8 the serious do-it-yourselfer, if they were
11:10:55 9 purchasing over the Internet they would never see
11:10:59 10 something that's, for example, shown in the
11:11:03 11 photograph, correct?

11:11:04 12 MR. CULIG: Object to form.

11:11:06 13 A I wouldn't say they would never see. You
11:11:08 14 don't -- just because they purchase over the
11:11:12 15 Internet that doesn't mean they don't go into a
11:11:14 16 store.

11:11:14 17 BY MR. THEUERKAUF:

11:11:14 18 Q Okay. But we don't know if they were
11:11:16 19 going into the store to purchase this product,
11:11:18 20 right?

11:11:19 21 MR. CULIG: Same objection.

11:11:21 22 A Doesn't -- all we're showing is a
11:11:24 23 photograph of a display of products. I don't know
11:11:27 24 whether they're going into a store or not. I don't
11:11:30 25 know whether they're purchasing over the Internet.

11:11:32 1 Doesn't matter. All we're -- all we're testing is
11:11:34 2 a picture.

11:11:36 3 BY MR. THEUERKAUF:

11:11:41 4 Q Do you know whether either of the parties
11:11:45 5 in this case sell products via the Internet?

11:11:49 6 A No, we didn't test that.

11:11:53 7 Q Well, I know you didn't test it, but do
11:11:55 8 you know whether they sell products over the
11:11:57 9 Internet?

11:11:59 10 A I wouldn't know.

11:12:00 11 Q Okay.

11:12:15 12 THE WITNESS: Some more water, Joe? My
11:12:20 13 throat gets so dry.

11:12:21 14 MR. THEUERKAUF: Why don't we take about
11:12:22 15 a five-minute break; is that all right?

11:12:24 16 THE WITNESS: That's good.

11:12:25 17 MR. THEUERKAUF: All right.

11:12:25 18 THE VIDEOGRAPHER: We'll conclude
11:12:28 19 videotape number 1 then and we'll go off the record
11:12:31 20 at 11:12 a.m.

11:12:31 21 (Whereupon, a recess was taken
11:12:31 22 at 11:12 a.m. and resumed at
11:12:36 23 11:21 a.m. as follows:)

11:20:25 24 THE VIDEOGRAPHER: We are now back on the
11:20:49 25 video record. The time is 11:21 a.m.

11:22:04 1 just want to be sure I'm clear, overinclusive
11:22:07 2 essentially means that the target -- or that the
11:22:10 3 population being surveyed includes people that
11:22:12 4 aren't relevant to the issue being studied?

11:22:14 5 A That's a good -- that's a good way of
11:22:16 6 putting it, yes.

11:22:17 7 Q Okay. Is it important in doing a
11:22:48 8 likelihood of confusion survey, for example, the
11:22:54 9 one done in this case, to filter out actual
11:22:57 10 customers of DeWalt?

11:23:02 11 A No.

11:23:03 12 Q And -- and I guess why do you say that?

11:23:14 13 A The relevant target market in this case
11:23:19 14 were people who were professional workmen or
11:23:22 15 serious do-it-yourselfers. It's very -- it's very
11:23:26 16 possible that these people either work with DeWalt
11:23:30 17 products or buy DeWalt products or own DeWalt
11:23:33 18 products.

11:23:36 19 Q And because of that couldn't it bias the
11:23:41 20 survey results?

11:23:42 21 A No.

11:23:44 22 Q And why do you believe that?

11:23:47 23 A DeWalt happens to have a very high market
11:23:50 24 share in these particular target markets, so the
11:23:53 25 fact that they are aware of DeWalt or because of

11:30:09 1 of the -- of the target population.

11:30:13 2 Q You say it's somewhat representative?

11:30:15 3 A I guess somewhat representative, yeah.

11:30:18 4 Yes.

11:30:20 5 Q But are there any -- any assumptions that
11:30:28 6 you make? I mean, is that essentially the
11:30:30 7 assumption that you make is that it's somewhat
11:30:33 8 representative?

11:30:34 9 A That's right.

11:30:42 10 Q So in this case for both the likelihood
11:30:47 11 of confusion and secondary meaning survey did you
11:30:50 12 generalize the results from the samples to your
11:30:52 13 target population?

11:30:58 14 MR. CULIG: Object to form.

11:31:01 15 A I observed the results, and in my expert
11:31:10 16 opinion I surmised that the results from the survey
11:31:14 17 were the opinions or the observations of what one
11:31:26 18 would generally find in a target market.

11:31:31 19 BY MR. THEUERKAUF:

11:31:41 20 Q Is it -- or would you agree that the --
11:31:44 21 the likelihood of confusion survey that you
11:31:46 22 conducted in this case did not test whether the
11:31:52 23 trade dress on the tools themselves caused a
11:31:56 24 likelihood of confusion?

11:31:57 25 A Yes.

11:31:58 1 Q You would agree?

11:31:59 2 A We tested the packaging.

11:32:01 3 Q Okay. So based on this likelihood of

11:32:13 4 confusion survey, you have not expressed any

11:32:20 5 opinions related to any -- any tools themselves; is

11:32:25 6 that correct?

11:32:25 7 MR. CULIG: Object to form.

11:32:27 8 A That's correct. We -- it was based on

11:32:30 9 the packaging.

11:32:32 10 BY MR. THEUERKAUF:

11:32:32 11 Q Okay. And based on this survey, is it

11:32:36 12 correct that you do not express any opinions

11:32:41 13 regarding any Rockwell packaging other than the

11:32:45 14 ones seen in this photograph here?

11:32:47 15 A That's right.

11:32:48 16 Q Okay. And I -- and I think I've -- I

11:33:14 17 asked you this before, and if I did I apologize,

11:33:18 18 but you have not -- other than these photographs

11:33:20 19 you've not seen any Rockwell packaging?

11:33:23 20 A That's right.

11:33:25 21 Q And the one in this photograph, do you

11:33:27 22 believe that's the only Rockwell packaging that

11:33:29 23 you've seen?

11:33:32 24 MR. CULIG: Object to form.

11:33:34 25 A I don't -- yes, I answered that question.

11:33:38 1 That's the only one I've seen.

11:33:40 2 BY MR. THEUERKAUF:

11:33:41 3 Q Okay. In this -- or in conducting a
11:33:58 4 likelihood of confusion survey similar to what
11:34:01 5 you've done here, does the designs and images on
11:34:10 6 the packaging have an effect on the survey in
11:34:17 7 addition to the colors?

11:34:20 8 MR. CULIG: Object to form.

11:34:21 9 A I didn't test that.

11:34:26 10 BY MR. THEUERKAUF:

11:34:26 11 Q Okay. So you -- you didn't test whether
11:34:30 12 or not the images and text and other designs on the
11:34:34 13 packaging have an effect on the survey?

11:34:37 14 A No, I didn't. I didn't test that.

11:34:40 15 Q Okay. And so let's say, for example, in
11:34:46 16 this photograph if -- on the Rockwell packaging if
11:34:55 17 that was a drill instead of a saw, could that have
11:34:59 18 a different -- could that have an impact on the
11:35:02 19 survey results?

11:35:03 20 A I don't know.

11:35:04 21 Q And you don't know because you didn't
11:35:06 22 test it?

11:35:06 23 A Didn't test it.

11:35:10 24 Q Do you know who took this photograph?

11:35:33 25 A No, I don't.

11:35:34 1 Q Okay. And do you know whether the
11:35:39 2 products as shown in that photograph were staged
11:35:45 3 that way for the photograph?

11:35:47 4 A I don't know.

11:35:47 5 Q I'm sorry?

11:35:48 6 A I don't know.

11:35:52 7 Q Was there a reason that in using this
11:36:10 8 photograph that you showed the survey
11:36:21 9 respondents -- well, and let me back up.

11:36:23 10 It looks like there's -- looks like
11:36:26 11 there's 10 different DeWalt products in that
11:36:32 12 picture, correct?

11:36:34 13 MR. CULIG: Object to form.

11:36:40 14 A I believe so, yes.

11:36:41 15 BY MR. THEUERKAUF:

11:36:41 16 Q And then there's the one Rockwell
11:36:46 17 product, correct?

11:36:47 18 A That's right.

11:36:47 19 Q Okay. Is there a reason why you showed
11:36:49 20 the survey respondents 10 DeWalt products and one
11:36:53 21 Rockwell product?

11:36:53 22 A That was the picture.

11:36:54 23 Q Okay.

11:36:55 24 A I was just instructed to use the picture.

11:36:57 25 Q Okay. But you did crop the picture,

12:43:17 1 A Okay?

12:43:19 2 Q Did you run a control group for this

12:43:22 3 likelihood of confusion survey?

12:43:23 4 A Not necessary because it's an

12:43:25 5 observational research.

12:43:28 6 MR. CULIG: Mr. Berger, again please let

12:43:30 7 him answer -- finish his question.

12:43:32 8 THE WITNESS: I'm sorry. I thought he

12:43:34 9 did. I thought he had finished his question.

12:43:39 10 BY MR. THEUERKAUF:

12:43:39 11 Q So it's your opinion that control groups

12:43:45 12 aren't necessary for observational research?

12:43:48 13 A That's correct, where you're testing an

12:43:51 14 association. If it was causal, then you would use

12:43:58 15 a control group.

12:43:59 16 Q But couldn't the association that people

12:44:01 17 are applying be for reasons other than what you're

12:44:04 18 testing for; for example, the trade dress?

12:44:11 19 MR. CULIG: Objection to form.

12:44:12 20 A In this case we just had them observe the

12:44:15 21 picture and asked a question based on the

12:44:18 22 observation.

12:44:18 23 BY MR. THEUERKAUF:

12:44:19 24 Q Okay. But my question is, I mean,

12:44:21 25 couldn't -- couldn't the reason for association be

12:47:55 1 do you mean by causality?

12:47:57 2 A Like the pill makes you -- the pill makes
12:47:59 3 you feel better or something.

12:48:01 4 Q Okay. So you are not in this survey
12:48:03 5 trying to determine whether the trade dress caused
12:48:06 6 the confusion?

12:48:08 7 A No. I was simply -- in this survey there
12:48:12 8 was no causality. It was simply observation. You
12:48:16 9 look at the picture and then you ask the question.

12:48:18 10 Q Okay.

12:48:19 11 A You didn't ask any causality.

12:48:22 12 Q Okay. So you weren't asking what caused
12:48:24 13 the association; is that correct?

12:48:25 14 A We didn't ask that.

12:48:27 15 Q Okay. So I'm just -- am I correct then,
12:48:32 16 I mean, that the survey is not asking then the
12:48:36 17 respondent's -- or it's not trying to determine the
12:48:39 18 cause of why the respondents are answering yes or
12:48:46 19 no?

12:48:46 20 A The main part of the survey is to observe
12:48:48 21 a photo and based on the observation do you think
12:48:52 22 it was put out by the same company.

12:48:54 23 Q And the cause is not determined?

12:48:57 24 A The why -- the why is simply a verbatim
12:49:00 25 answer that really has very little to do with what

12:51:01 1 A Within the array would be the two
12:51:03 2 products.

12:51:04 3 Q Okay. What -- the survey that you
12:51:12 4 conducted in this case for likelihood of confusion,
12:51:15 5 was that done using Squirt methodology?

12:51:18 6 A No.

12:51:18 7 Q Okay.

12:51:19 8 A Simply observation -- observing a photo.

12:51:23 9 Q Okay. Have you heard of is it Eveready?

12:51:30 10 A Eveready, yeah.

12:51:31 11 Q Can you explain to me what that
12:51:33 12 methodology is?

12:51:34 13 A The Eveready is you show one product and
12:51:41 14 you ask essentially who puts it out. Maybe you
12:51:50 15 take the -- maybe you take the writing off the --
12:51:54 16 the brand writing off of it and you ask who puts it
12:51:57 17 out.

12:51:57 18 Q Am I correct that you didn't use the
12:52:00 19 Eveready methodology in this case?

12:52:02 20 A No, I did not.

12:52:04 21 Q Just to -- real quick back on the control
12:52:40 22 group, is the term control cell the same thing as a
12:52:45 23 control group?

12:52:46 24 A I suppose -- I suppose it would -- might
12:52:50 25 be. I've never really heard that terminology

12:55:52 1 studies we did in this case.

12:55:54 2 Q Okay. And at the time of your initial
12:56:01 3 engagement was it requested that you do the
12:56:04 4 secondary meaning survey along with the likelihood
12:56:06 5 of confusion survey?

12:56:07 6 A Yes, I was directed to do that.

12:56:09 7 Q Okay.

12:56:10 8 A Instructed to do that.

12:56:12 9 Q Did you do the secondary meaning survey
12:56:16 10 at the same time that you did the likelihood of
12:56:17 11 confusion survey?

12:56:19 12 A I believe so.

12:56:20 13 Q Okay. So just so I can make the record
12:56:27 14 clear because this report I think was also
12:56:28 15 submitted on November 26, 2013, but were these
12:56:31 16 surveys and analysis done a year prior to that?

12:56:36 17 A I can see when it was dated.

12:56:43 18 It was dated November 14th, 2012.

12:56:45 19 Q Okay.

12:56:46 20 A Page 11.

12:56:47 21 Q Yeah. Okay.

12:56:50 22 And what was your goal with respect to
12:56:57 23 this survey or these two surveys I should say?

12:57:01 24 A "This double-blind survey, which was
12:57:18 25 given over the Internet, was designed to test

12:57:20 1 whether DeWalt's distinctive yellow and black trade
12:57:24 2 dress has achieved secondary meaning in that a
12:57:26 3 large portion of buyers in the marketplace perceive
12:57:30 4 that power tools with a black and yellow trade
12:57:32 5 dress come from a single source." That was the
12:57:36 6 goal at page 6.

12:57:39 7 Q Okay. And so why in this instance did
12:57:46 8 you -- did you conduct two separate secondary
12:57:50 9 meaning surveys?

12:57:52 10 A One was to use the photo of a product
12:57:57 11 that had black and -- black and yellow, and the
12:58:03 12 other was to describe black and yellow in the
12:58:08 13 marketplace, just the -- just the description, the
12:58:12 14 verbal description black and yellow.

12:58:14 15 Q Okay. And why did you do that?

12:58:18 16 A Well, in putting it together I felt that
12:58:22 17 that was the best way of doing it. Two different
12:58:24 18 surveys would do it, one where you actually show
12:58:27 19 the product and the second when you describe what
12:58:31 20 the product looked like.

12:58:31 21 Q And --

12:58:34 22 A Or was packaged as.

12:58:36 23 Q -- why did you believe that was the best
12:58:39 24 way?

12:58:39 25 A My expert opinion I believed it was the

13:00:06 1 and the packaging, people would tend to recall
13:00:09 2 that. And in this case it proved to be extremely
13:00:19 3 an effective way of doing it. People did recall
13:00:22 4 it.

13:00:23 5 Q Okay. The picture -- in the first
13:00:30 6 secondary meaning survey the picture is of a saw,
13:00:37 7 correct?

13:00:38 8 A It's in the -- we can look at it or we
13:00:45 9 can look at a depiction of it in -- there it is.
13:01:00 10 Page -- doesn't have a page. It's a picture of a
13:01:04 11 saw, yeah.

13:01:05 12 Q Is it in Exhibit B of your report?

13:01:13 13 A Yes, it is.

13:01:21 14 Q Okay.

13:01:22 15 A Third -- third page of Exhibit B.

13:01:24 16 Q Okay. And was that a photograph that was
13:01:28 17 supplied to you?

13:01:29 18 A Yes.

13:01:30 19 Q Okay. And who supplied that photograph
13:01:33 20 to you?

13:01:35 21 A My client.

13:01:36 22 Q Okay. Did the Niro firm send it to you
13:01:40 23 or did Black & Decker send it to you?

13:01:42 24 A Niro firm.

13:01:44 25 Q Okay. In either one of these secondary

13:01:50 1 meaning surveys did you include either a
13:01:56 2 description or a photograph of packaging?

13:02:00 3 A No, I didn't.

13:02:01 4 Q Okay.

13:02:10 5 A Excuse me. In the second survey it very
13:02:17 6 well could be construed as packaging. What did we
13:02:22 7 ask in the second survey?

13:02:27 8 We asked, "If you were shopping at a
13:03:05 9 Home Depot, Lowe's or some other retailer that
13:03:07 10 sells power tools and you saw a power tool that was
13:03:11 11 yellow and black, would you have a belief as to who
13:03:14 12 or what company makes or manufactures it?"

13:03:19 13 Well, if you were at a Home Depot and
13:03:22 14 you saw it you might very well have seen the
13:03:25 15 packaging that was yellow and black if you're at
13:03:28 16 that store. So you could have seen the tool or you
13:03:31 17 could have seen the packaging.

13:03:32 18 Q But your question says the power tool,
13:03:35 19 correct?

13:03:35 20 A The question says the power tool, yeah.

13:03:38 21 Q Okay. And it doesn't say power tool
13:03:40 22 packaging, correct?

13:03:42 23 A No, but it could be construed as that.
13:03:44 24 It's possible because you see packaging when you go
13:03:46 25 in the store as obviously as you see the -- in

13:03:49 1 Exhibit 1 -- I mean in the first survey. So but,
13:03:52 2 you know, I think literally it says if you saw the
13:03:57 3 tool then it means you saw the tool.

13:03:59 4 Q Right. Correct.

13:04:01 5 In your report, in your secondary
13:04:09 6 meaning report, have you made any conclusions as to
13:04:15 7 whether or not there's secondary meaning for
13:04:17 8 packaging?

13:04:19 9 A No.

13:04:20 10 Q Okay. If you'll turn to page 7, please.

13:04:48 11 Under the qualifications down there in
13:04:51 12 paragraph 10 it says had to be 18, had to be age 18
13:04:55 13 or over, had to be a professional tradesman or
13:04:58 14 serious do-it-yourselfer, which we defined as owned
13:05:03 15 more than 1,000 worth of power tools. Do you see
13:05:05 16 that?

13:05:05 17 A Yes.

13:05:06 18 Q So is it accurate that they have to meet
13:05:08 19 both of those, that they have to be both?

13:05:11 20 A No.

13:05:11 21 Q Meaning that they have to be 18 or over
13:05:14 22 and a professional tradesman or a do-it-yourselfer?

13:05:18 23 A That's right.

13:05:18 24 Q Okay. In your secondary -- let me ask
13:05:44 25 you this. In doing surveys like this are you

14:20:26 1 those?

14:20:28 2 A I just don't have them. They would have
14:20:31 3 been in -- if I had kept them they would have been
14:20:34 4 in my file, but I don't have anything in it.

14:20:42 5 Q Would you have destroyed them after this
14:20:44 6 survey?

14:20:45 7 A I don't know. I don't know if I would
14:20:47 8 have destroyed. I moved my office and a lot of
14:20:51 9 things didn't move with me, so that might have
14:20:55 10 fallen through the cracks somehow.

14:20:58 11 Q This type of survey -- well, the protocol
14:21:13 12 used in this survey's much different than the
14:21:16 13 likelihood of confusion survey that you submitted,
14:21:19 14 correct?

14:21:20 15 A That's right.

14:21:22 16 Q Is -- in Exhibit 13 is the protocol
14:21:29 17 consistent with the Squirt methodology?

14:21:32 18 A Yes.

14:21:41 19 Q Let me ask you one question before I --
14:21:43 20 before I forget. I've been meaning to ask you this
14:21:46 21 for some time, and that is on these surveys where
14:21:49 22 we're dealing with trade dress and colors is it
14:21:57 23 important to determine whether any of the survey
14:21:59 24 respondents are color-blind?

14:22:02 25 MR. CULIG: Object to form.

14:22:05 1 A I don't know what the percentages of
14:22:07 2 color-blind people there are, but I never -- I
14:22:12 3 never did that in a survey.

14:22:14 4 BY MR. THEUERKAUF:

14:22:14 5 Q You've never tried to determine whether
14:22:16 6 people --

14:22:16 7 A To determine whether they're color-blind
14:22:18 8 or not.

14:22:20 9 Q In these surveys, though, I've noticed
14:22:35 10 you -- you asked the question whether the survey
14:22:38 11 respondents require eyeglasses?

14:22:40 12 A That's right.

14:22:41 13 Q And why do you do that?

14:22:42 14 A Well, they have to be able to see the
14:22:44 15 screen.

14:22:44 16 Q Okay. And isn't it true that you'd want
14:22:48 17 the individuals to be able to see the colors as
14:22:50 18 well?

14:22:53 19 A I'm mainly interested in being able to
14:22:57 20 see the questions.

14:22:57 21 Q And not necessarily the colors in the
14:22:59 22 photographs?

14:23:00 23 A Well, whatever is being presented I want
14:23:03 24 them to be able to see it.

14:23:05 25 Q Okay. So in these likelihood of

14:23:06 1 confusion surveys dealing with trade dress --

14:23:09 2 A And colors.

14:23:10 3 Q -- you'd want them to be able to see the

14:23:12 4 colors?

14:23:13 5 A I want them to be able to see what's

14:23:15 6 being presented on the screen, yeah. Colors and

14:23:18 7 text.

14:24:03 8 MR. THEUERKAUF: Exhibit 14.

14:24:03 9 (Whereupon the document was

14:24:03 10 marked Berger Exhibit 14 for

14:24:03 11 identification as of

14:24:04 12 02/14/2014.)

14:24:04 13 BY MR. THEUERKAUF:

14:24:05 14 Q If you could take a look at Exhibit 14

14:24:07 15 for me, please. Tell me if you recognize that

14:24:15 16 document.

14:24:27 17 I'll note for the record that it's

14:24:29 18 BD030866 through 30885.

14:24:47 19 A I really don't recognize this document.

14:24:54 20 Q Okay. Do you know if it's the -- the

14:24:58 21 results or the -- yeah, the results to the survey

14:25:06 22 that was Exhibit 13?

14:25:08 23 MR. CULIG: Objection; foundation.

14:25:25 24 A It very well could have been, yes.

25

15:45:19 1 BY MR. THEUERKAUF:

15:45:19 2 Q Okay.

15:45:20 3 A In this picture.

15:45:22 4 Q Okay. And different shades of colors in
15:45:37 5 a photograph such as this one -- well, if we
15:45:43 6 presented this same photograph with different
15:45:45 7 shades of those same colors -- or different shades
15:45:48 8 of those colors, could that affect the results of
15:45:51 9 the likelihood of confusion survey?

15:45:53 10 MR. CULIG: Object to form.

15:45:55 11 A Well, I -- all I can say is what we
15:45:59 12 presented in the survey was what I -- and again,
15:46:05 13 this is -- this is not a very good print and it is
15:46:08 14 not a -- not the -- not the picture that I first
15:46:12 15 saw when I was brought into this case.

15:46:16 16 BY MR. THEUERKAUF:

15:46:17 17 Q But would you agree if the shading of the
15:46:20 18 colors changes or if the shading of the colors was
15:46:24 19 different that it could change the survey results?

15:46:28 20 MR. CULIG: Same objection.

15:46:31 21 A In looking at this picture I'm seeing
15:46:35 22 that a number of the products are -- depending on
15:46:38 23 where they are in the light from the light that was
15:46:41 24 used to take the picture, that's where the -- the
15:46:45 25 different colors take place.